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## POSTAL SERVICE

### 39 CFR Part 775

#### National Environmental Policy Act Implementing Procedures

**AGENCY:** Postal Service.

**ACTION:** Final rule.

**SUMMARY:** The Postal Service (USPS)<sup>™</sup> is publishing this final rule to amend a categorical exclusion (CATEX) in the Postal Service's National Environmental Policy Act (NEPA) implementing procedures. This document responds to comments received concerning a previously-published interim final rule, and adopts without change the text of the amendments set forth in the interim final rule.

**DATES:** *Effective date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Charlotte Parrish, Environmental Specialist, at [charlotte.parrish@usps.gov](mailto:charlotte.parrish@usps.gov) or 201-714-7216, or Matthew Raeburn, Environmental Counsel, at [matthew.d.raeburn@usps.gov](mailto:matthew.d.raeburn@usps.gov) or 202-268-4570.

#### SUPPLEMENTARY INFORMATION:

##### *Summary*

On January 13, 2014, the Postal Service published an interim final rule with request for comments to amend a categorical exclusion (CATEX) in the Postal Service's National Environmental Policy Act (NEPA) implementing procedures (79 FR 2102). As explained in that document, the amendment focuses the CATEX more clearly on activities that, absent extraordinary circumstances, do not normally have the potential for individual or cumulative significant impacts on the quality of

the human environment. The amendment also makes the CATEX consistent with analogous CATEXs used by the General Services Administration (GSA) and other major federal landowners.

In response to the interim final rule, the Postal Service received five comment letters. Commenters included non-governmental organizations, a municipality, three Members of Congress, and an individual. The commenters expressed their concerns about the interim final rule, which the Postal Service discusses and responds to in this document. In short, the five comment letters received from the public have not raised issues prompting the Postal Service to modify or deviate from its interim final rule. This final rule thus confirms and adopts the interim final rule's amendment to the Postal Service's CATEX.

#### *Rulemaking's Relation to Litigation over Previous CATEX*

Some commenters note the rulemaking's timing given the preliminary injunction in *National Post Office Collaborate v. Donahoe*, No. 3:13cv1406, 2013 WL 5818889 (D. Conn. Oct. 28, 2013). That the court's reading of the Postal Service's previously-worded CATEX in that case differs from the Postal Service's own longstanding interpretation demonstrates the need for clarification, which brings the Postal Service's CATEX into accord with federal agencies' comparable CATEXs.

Regardless of its timing, the amended CATEX constitutes a reasonable interpretation of the Postal Service's obligations under NEPA. The United States Supreme Court has held that an "initial agency interpretation [of a statute] is not instantly carved in stone" and that any agency "must consider varying

interpretations and the wisdom of its policy on a continuing basis.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984). As noted in the interim final rule, the Council on Environmental Quality (CEQ) has recommended that agencies periodically review their CATEXs and benchmark them against other agencies’ (75 FR 75628, Feb. 18, 2010).

One commenter asserted that the new CATEX would reinstate a process that was purportedly rejected or temporarily enjoined in *National Post Office Collaborate*. That portrayal of the court’s order is inaccurate. The court did not find the Postal Service’s application of its property disposal CATEX *per se* deficient under NEPA. Instead, the court found the Postal Service’s *application* of the CATEX to be procedurally deficient based, in large part, on how the CATEX was worded prior to this rulemaking. *National Post Office Collaborate*, No. 3:13cv1406, 2013 WL 5818889, at 13-15. At no point did the Court dispute the validity of the CATEX. Thus, this rulemaking merely clarifies the Postal Service’s intent by rewording its property disposal CATEX, which, due to its former wording, the court in *National Post Office Collaborate* read differently from the Postal Service’s longstanding interpretation.

This rulemaking is not retroactive and does not affect actions taken under the prior CATEX. See generally, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that agency regulations are not retroactive except as specifically authorized by Congress).

#### *The Postal Service’s Implementation of NEPA*

The Postal Service applies its NEPA process and implements its CEQ-

approved NEPA regulations for *every* property disposal. The interim final rule has not changed that, nor would this final rule. Nevertheless, a group of commenters suggests that the interim final rule would offer the Postal Service a way to bypass the NEPA reporting requirements that apply when there is no significant effect on the human environment. As was the case before this rulemaking, however, even where a proposed property disposal does not require an environmental assessment (EA), the Postal Service's NEPA process will still result in NEPA documentation: notably, the Facilities Environmental Checklist and the Record of Environmental Consideration (see U.S. Postal Service, *Facilities Environmental Guide Handbook RE-6* § 2-4.1 (Nov. 2004)). Those documents are a matter of public record. Rather than somehow bypassing NEPA, the Postal Service would continue to document its decisionmaking throughout the NEPA process, including where the Postal Service applies a CATEX, which itself is an application of NEPA.

*The Postal Service's Consistency with Other Agencies' Interpretation of NEPA*

Some commenters assert that the amended CATEX does not follow NEPA, because it emphasizes the surrounding property uses around the Postal Service property proposed for disposal. As discussed in the interim final rule document, however, other federal landowners have incorporated the same comparison as an important aspect of their NEPA processes (79 FR 2102). The Postal Service's amended CATEX mirrors the language of a long-standing and well-established CATEX used by the General Services Administration (GSA) (see 65 FR 69558, Nov. 17, 2000). The amended CATEX also follows the lead of the United States

Coast Guard (USCG), which similarly adopted a CATEX based on the GSA's language (78 FR 44140). The Postal Service is unaware of any authority suggesting those CATEXs are not valid exercises of the agencies' discretion in implementing NEPA.

Several groups' combined comment letter purports to contrast the Postal Service's current regulations, which deem historic status to be one of many factors considered in completing its "extraordinary circumstances" checklist, with analogous provisions in the GSA and USCG regulations. Upon careful review of these comparable regulations and discussions with responsible personnel at each agency, the Postal Service has confirmed that its approach to historic property disposals under NEPA is no less thorough than the approaches shared by those other two federal owners of historic properties. Like the Postal Service, both GSA and USCG include historic status as one factor in a more holistic review of the proposed action, such that the CATEX may remain applicable to a historic property in light of mitigating actions and other circumstances. In this regard, those agencies' procedures remain consistent with the Postal Service's own.

Some commenters assert that the Postal Service has not properly substantiated that property disposals under the revised CATEX would not normally result in significant environmental impacts. As explained in the interim final rule, CEQ has advised that an agency can substantiate its own CATEX by comparing another agency's experience promulgating and applying a comparable CATEX (see 75 FR 75628). That – along with the Postal Service's experience described in the interim final rule and the experience of two federal agencies with comparable

CATEXs – supports the Postal Service’s decision to finalize its amended property disposal CATEX via this final rule.

All commenters convey the general notion that disposals of historic properties should warrant more NEPA review (not less). The Postal Service’s revision to its CATEX in no way limits the Postal Service’s NEPA review of historic properties. Like GSA and USCG, the Postal Service already has additional procedures specifically for reviewing proposed disposals of historic properties (see, *Facilities Environmental Guide Handbook RE-6* § 3-4.1 (“Historic and cultural resources are considered in the environmental planning processes, both environmental due diligence and NEPA[.]”). As explained with regard to the interim final rule (79 FR 2102, 2103), the Postal Service’s procedural safeguards regarding historical properties remain an integral part of the Postal Service’s property disposal process. See, e.g., *Facilities Environmental Guide Handbook RE-6* § 3-4.3.4.4.4 (discussing circumstances prompting and requirements for implementing preservation covenants). Historic status remains a factor in determining whether “extraordinary circumstances” require further NEPA review, notwithstanding an otherwise applicable CATEX. This rulemaking does not diminish the significance of historic status as a factor in an overall assessment of potential environmental impacts and extraordinary circumstances.

#### *Historical Status Is Not a Per Se Extraordinary Circumstance*

Some commenters ask that the Postal Service couple its CATEX revision with an amendment making a property’s historic listing an “extraordinary circumstance” that would automatically trigger an EA. This suggestion is at odds

with CEQ guidance, however. According to CEQ, “the agencies may define their extraordinary circumstances differently, so that a particular situation, such as the presence of a protected resource [e.g., historic property], is not considered an extraordinary circumstance *per se*, but a factor to consider when determining if there are extraordinary circumstances, such as a significant impact to that resource” (75 FR 75628, 75629, Dec. 6, 2010). CEQ’s guidance is consistent with the Postal Service’s experience with sales of historical properties.

In a great many instances, the disposal of a historic Postal Service property does not result in significant environmental impacts. As described in the previous section, the Postal Service, GSA, and USCG each consider whether such potential issues exist and whether they could be sufficiently alleviated outside of the NEPA process, such as through historic preservation covenants. In other words, historic status may be a starting point to consideration of “extraordinary circumstances,” but it is not an immediate EA decision point under the regulatory scheme of the GSA, USCG, or USPS. The Postal Service’s “extraordinary circumstance” regulations are consistent with those of the GSA and USCG in this regard, and the use of those agencies’ CATEXs as models does not provide a basis for additional changes to other aspects of the Postal Service’s CATEX regulations.

One commenter believes that any proposed action to move Postal Service activities from a downtown area should be subject to an environmental impact statement (EIS). Although this rulemaking’s CATEX covers proposed actions to dispose of property rather than to move the Postal Service’s operations from one place to another, both categories of decisions and others are subject to the Postal

Service's NEPA process. Under the Postal Service's longstanding NEPA regulations, an EIS does not generally need to be performed for a Postal Service action, including a routine transfer of operations, absent extraordinary circumstances. See 39 CFR 775.5(a); 40 CFR 1508.27.

*Consistency of this NEPA CATEX with National Historic Preservation Act*

Although the National Historic Preservation Act (NHPA) and National Register of Historic Places are not immediately relevant to this NEPA rulemaking, commenters have discussed their application to federal entities' property disposals, particularly the GSA's. Several commenters state that the Postal Service must consider a property's listing on the National Register of Historic Places, which the Postal Service already does as part of its NEPA analysis. Commenters also make an effort to distinguish the Postal Service's requisite procedures for evaluating potential disposals of historical properties with GSA's.

As discussed above, the Postal Service already has special procedures for reviewing proposed disposals of historic properties (*Facilities Environmental Guide Handbook RE-6* §§ 3-4.1, 3-4.3.4.4.4), and this rulemaking does not change or otherwise affect those procedures or the significance of a property's historic status. The Postal Service voluntarily complies with the requirements of Section 106 of the NHPA (16 U.S.C. 470f) in making a finding that there would be no adverse effects to a historic property as a result of a disposal, or if an adverse effect is found, then consulting with the requisite parties to develop an agreement to mitigate adverse effects. These procedures remain effective notwithstanding this rulemaking, and they are generally similar to other Federal entities' corresponding procedures. As



such, they do not affect the reasonableness of the Postal Service's amendment to its NEPA procedures on the basis of GSA's model.

*The Public Trust Doctrine*

One commenter offered an opinion that the common-law public trust doctrine affects the Postal Service's ability to modify a NEPA CATEX. While courts have applied the public trust doctrine to natural resources (particularly water-related resources), there does not appear to be authority for the proposition that the public trust doctrine applies to government-owned facilities and property. Such a proposition would seem contrary to the long history of disposals of governmental property. Nor does the Constitution pose any such limits on Congress's powers to provide for the disposal of federal property.

In fact, the Constitution explicitly vests Congress with the power "to dispose of any kind of property belonging to the United States . . . without limitation."

*Alabama v. Texas*, 347 U.S. 272, 273 (1954) (per curiam) (internal quotation marks and citation omitted). Congress has expressly delegated its disposal powers to the Postal Service. See 39 U.S.C. 401(5). Thus, even if the public trust doctrine somehow applied to the federal government as a general matter, the doctrine still would not encumber the Postal Service as a statutory matter. See 39 U.S.C. 410(a).

Even if the public trust doctrine had any relevance for disposals of government property, the public trust doctrine is a distinct area of state law that does not apply to a federal NEPA rulemaking. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012) (emphasizing that the public trust doctrine "remains a matter

of state law”). As such, the Constitution’s Supremacy Clause bars it from applying to the Postal Service.

*Effect on Public Participation*

One group of commenters asserts that the interim final rule would reduce public participation in the facility disposal process at a time when there is great national interest in historic Post Offices. Adoption of this final rule will have no adverse effect on the existing robust avenues for public participation in Postal Service processes for disposals of historic properties. The Postal Service, itself a historic institution, highly values its historic properties and takes seriously its voluntary compliance with sections 106, 110, and 111 of the National Historic Preservation Act and the historic preservation regulations.

In particular, with respect to the occasional sale of an historic post office, the Postal Service strictly adheres to the section 106 regulations (36 CFR part 800), which provide a comprehensive, consistent, transparent, consultative process. That process requires identifying historic properties, assessing the effects of Postal Service undertakings and, in consultation with local officials and with community input, seeking ways to avoid, minimize or mitigate any adverse effects on historic properties. Additionally, for real property disposals, under its regulations implementing applicable provisions of the Intergovernmental Cooperation Act (39 CFR part 778), the Postal Service provides opportunities for consultation by elected officials of those state and local governments that would be directly affected by the Postal Service’s real property disposals.

## List of Subjects in 39 CFR Part 775

Environmental impact statements.

For the reasons stated in the preamble, 39 CFR part 775 is amended as follows:

### **PART 775 – NATIONAL ENVIRONMENTAL POLICY ACT PROCEDURES**

1. The authority citation for 39 CFR part 775 continues to read as follows:

**Authority:** 39 U.S.C. 401; 42 U.S.C. 4321 *et seq.*; 40 CFR 1500.4.

2. In § 775.6, paragraph (e)(8) is revised to read as follows:

#### **§ 775.6 Categorical exclusions.**

\* \* \* \*

(e) \* \* \*

(8) Disposal of properties where the size, area, topography, and zoning are similar to existing surrounding properties and/or where current and reasonable anticipated uses are or would be similar to current surrounding uses (e.g., commercial store in a commercial strip, warehouse in an urban complex, office building in downtown area, row house or vacant lot in an urban area).

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[FR Doc. 2014-13418 Filed 06/09/2014 at 8:45 am; Publication Date: 06/10/2014]